

(1983) 01 BOM CK 0014

In the Bombay High Court

Case No : Misc. Petition No. 2422 of 1979

Union Carbide India Ltd.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 01-01-1983

Acts Referred:

Customs Act, 1962 — Section 14(1)

Citation : (1984) 17 ELT 63

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

1. The petitioners are a Company incorporated under the provisions of the Indian Companies Act and are engaged in the business of manufacturing and selling dry cell batteries, chemicals and plastics, agricultural pesticides and several other products. At the relevant time, 60% of the paid-up share capital of the petitioners was held by the American company, known as Union Carbide Corporation. The said American company is engaged in carrying on manufacturing, selling and trading operations worldwide, and among various products manufactured and exported is a product known as "Sevin-Carbaryl Technical". The product is used in the formulation of various kinds of insecticides pesticides. In or about February 1969, the petitioners commenced importing the said product for their own use against Actual Users" licences granted in favour of the petitioners for the purpose of formulating pesticides at the plant set up by the petitioners at Bhopal in Madhya Pradesh. The imports from the American company took place on principal-to-principal basis without involving any concession or rebate in the price of the product.

2. In the year 1973, the petitioners received an offer from the American company for supply of 4,000 tons of Sevin at the rate of 71.4 U.S. cents per lb. F. A. S. United States ports. The Ministry of Petroleum and Chemicals permitted the petitioners to accept the said offer on condition that 50% of the material so imported by the petitioners would be made over to the State Trading Corporation

at the same price. An import licence dated December 29, 1973 was granted to the petitioners in respect of the said import with a condition that 50% of the imports would be delivered to the State Trading Corporation on high-seas at cost price without charging any commission. Accordingly, an agreement was entered into between the petitioners and State Trading Corporation on January 24, 1974, under which the petitioners agreed to transfer to S.T.C. 2,000 metric tonnes of Sevin at the price of 71.4 U.S. cents per lb. It was also agreed that the State Trading Corporation shall bear half of the expenses relating to Letter of Credit charges, interest and such other expenses as may be mutually agreed upon from the date the Letter of Credit is opened till the delivery of the shipping documents. The agreement was extended for one more year by an Addendum dated June 16, 1975, and a further licence dated February 22, 1975 was also issued to the petitioners for the import of Sevin during 1975 and 1976 on the same terms and conditions as the earlier licence.

3. In respect of the imports made by the petitioners under the licence bearing a condition of 50% diversion to the State Trading Corporation, the Customs Authorities insisted on loading 2% of the invoice price not only in respect of imports made by the petitioners for their own use, but also in respect of the quantities meant for the State Trading Corporation. The petitioners paid duty under protest and thereafter filed the refund applications. The refund applications were disallowed and the petitioners carried appeals to the Appellate Collector, but all the appeals were rejected and an appeal against the order dated May 13, 1975 was dismissed only on the ground that the petitioners failed to furnish documentary evidence in support of the claim. An appeal against the order dated June 9, 1975 was disposed of holding that the import by an independent importer showed a commission of 2% payable to the petitioners and that represented the assessable value u/s 14(1)(a) of the Customs Act. In respect of an order dated March 13, 1975, the appeal was dismissed on the ground that the petitioners were related to the supplier and the amount paid by independent importers represented the price u/s 14(1)(a) of the Act. An appeal against the order dated July 8, 1975 was dismissed on a finding that the appellants did not disclose the basis on which the Customs Authorities had loaded the invoice value, and that there was no order or direction of the Customs under which the invoice value had been so loaded, and therefore, there was no material on record on the basis of which the same could be entertained. Against the four orders passed by the Appellate Authority, the petitioners preferred four revision applications before the Government of India. One of the revision application was disposed of by the Central Government by an order dated September 15, 1977 and the matter was remitted back to the competent authority on the ground that the invoice and the bill of entry were not recorded and the Government could not verify on what basis 2% had been loaded to the invoice value. The proceedings after remand are still not disposed of. The remaining three revision applications were disposed of by a common order dated July 27, 1979. The revisional authority came to the conclusion that no

commission was allowable to the petitioners in respect of the imports and it would not be correct in law to load 2% to the invoice value. On this finding, the revisional authority ought to have allowed all the three revision applications, but the revisional authority felt on scrutiny of the record that the case fell within the purview of Rule 5 of the Customs Valuation Rules, 1963 read with Section 14(1) (b) of the Customs Act, and therefore, the loading of 2% to the invoice value was proper. The revisional authority held that the petitioners were a "branch-cum-distributor" of the American company and the expenses ordinarily incurred by the petitioners in that capacity ought to be included while determining the value of imported goods. It was also held that though the expenses incurred by the petitioners in their capacity as "branch-cum-distributor" have not been analysed, still it would be reasonable to assume that 2% would not be on high side or unreasonable. The order of the revisional authority is under challenge in this petition filed under Article 226 of the Constitution of India.

4. Shri Vahanvati, learned counsel appearing in support of the petition, submitted that there was no material before the revisional authority to hold that loading of 2% was proper in view of provisions of Rule 5 the Customs Valuation Rules. Shri Vahanvati complained that the revisional authority had made out a new case for the Department without giving any opportunity to the petitioners to meet such claim. It was urged that neither at the personal hearing granted to the petitioners nor at any subsequent stage any hint was given that the revisions would be disposed of on the basis of application of Rule 5 of the Customs Valuation Rules. The learned counsel urged that the revisional authorities on recording a finding that loading of 2% to the invoice value was not permissible because no commission was received by the petitioners, ought to have allowed the revision and ordered refund of the additional duty paid by the petitioners. There is considerable merit in the submissions of Shri Vahanvati that the revisional authorities have made out a new point for the Department while passing the order. The Respondents have not filed any return to traverse the contentions of the petitioners that the revisions were disposed of on a point of which the petitioners were never given any notice. Although the grievance of Shri Vahanvati on this aspect is justified, I am not inclined to set aside the order of the revisional authority only on that count. I propose to examine the validity of the order of the revisional authority even on merits.

5. The revisional authority has placed reliance upon Rule 5 of the Customs Valuation Rules, and the rule reads as under :

"5. (a) Where any goods are imported by or through, sole agent, distributor or indentor appointed for the whole of India or any region thereof, the expenses ordinarily incurred by him in that capacity together with the expenses ordinarily incurred by the regional agents, or indentor, if any, in that capacity shall be included while determining the value of the imported goods.

(b) Where any goods are imported by a branch or subsidiary of the exporter, the provisions of sub-rule (a) shall apply as if the importation had been made by a

sole agent."

The plain reading of this rule indicates that the expenses ordinarily incurred by a sole agent, distributor or indentors are to be included while determining the value of imported goods are if the goods are imported by a branch or subsidiary of the exporter, then the importation is to be treated as made by a sole agent. It is obvious that the expenses are incurred by the sole agent, distributor or indentor because the goods imported by them are further distributed and not used by themselves. The concept of import by agent or distributor is that the import is made not for themselves but further distribution. Provisions of Rule 5(a) would be attracted only in cases where the goods are imported by a sole agent, distributor or indentor. In the present case, the goods are imported by the petitioners for their own consumption. Shri Dalal, learned counsel appearing on behalf of the Department, submitted that the petitioners are a subsidiary of the American company and therefore under sub-rule (b) of Rule 5 the importation by the petitioners will have to be treated as made by a sole agent. The submission cannot be accepted, because the petitioners have not imported the goods from the American company for further distribution in this country, but the import is for their own consumption. Rule 5(a) and (b) have no application whatsoever to an import made by a subsidiary of the exporter when such import is for consumption by the importer himself and not for further distribution.

6. Shri Dalal made a faint attempt to urge that the petitioners had not imported the goods for their own consumption, but 50% of the imported items were for the benefit of State Trading Corporation, and therefore, the petitioner should be treated as the agent or distributor for State Trading Corporation. There is no merit in this submission also. The petitioners were not acting as the agent or distributor of the State Trading Corporation, but were permitted to make import even for themselves on condition that 50% of the import would be diverted to the State Trading Corporation. The import licence granted to the petitioners sets out that following conditions which speaks volumes about the nature of the import by the petitioners. The conditions are (1) the licence has been issued subject to the condition that 50% of every consignment shipped would be made over to the State Trading Corporation on the high-seas basis; (2) such transfer by the petitioners would be at the cost price and no commission etc. would be charged on account of this transaction and (3) it will be ensured that the imported material is of the requisite specifications and purity. It is clear that the licence was granted to the petitioners on condition that 50% of the import would be diverted to the S.T.C. and the import made under such licence by the petitioners can by no stretch of imagination be held to be an import by an agent or distributor as contemplated by Rule 5(a) for the State Trading Corporation. In my judgment, the finding of the revisional authority that the provisions of Rule 5(a) and (b) of Customs Valuation Rules are attracted to the import made by the petitioners is entirely erroneous and unsustainable.

7. Shri Dalal submitted that the petitioners were required to bear the expenses

for the import of the consignment and as the State Trading Corporation was entitled to receive 50% of the consignment of the cost price, the expenses borne by the petitioners should be justly added to the invoice price. The submission overlooks that under clause (6) of the agreement dated January 24, 1974 between the petitioners and State Trading Corporation, it is clearly provided that the State Trading Corporation should bear half of the expenses relating to letter of credit charges, interest and such other expenses, as mutually agreed. This clause conclusively establishes that though the State Trading Corporation was entitled to secure 50% of the consignment imported by the petitioners at the cost price, still the other allied expenses in respect of the said 50% consignment were to be borne by the State Trading Corporation. The petitioners had not taken any liability to bear any expenses in regard to the import for the State Trading Corporation. In my judgment, the revisional authority had clearly misconceived the nature of the import by the petitioners and have erroneously concluded that the expenses incurred by the petitioners in their capacity as a branch of the exporter shall be included while determining the value of the imported goods.

8. Shri Vahanvati is also right in his submission that even assuming that the revisional authority was right in its conclusion, still the loading of 2% to the invoice value was without any basis or logic. The assumption that 2% would not be on high side or unreasonable is without any foundation. It is not necessary to ascertain what amount could be loaded to the invoice value, because in my judgment, provisions of Rule 5(a) and (b) have no application to the import in question. The order of the revisional authority is erroneous and is required to be set aside.

9. Accordingly, petition succeeds and the order dated July 27, 1979 passed by the Government of India, Ministry of Finance (Department of Revenue), and the order passed by the Appellate Collector in Appeal No. S/491144/75R dated November 26, 1975 and the order dated June 9, 1975 passed by the Assistant Collector rejecting the refund application and the order dated April 27, 1976 passed by the Appellate Collector in Appeal No. S/49-1440/75R and the order dated March 13, 1975 passed by the Assistant Collector, rejecting the refund application, and the order dated October 25, 1975 passed by the Appellate Collector in Appeal No. S/49-1985/75R and the order dated May 13, 1975 passed by the Assistant Collector, rejecting the refund application are set aside and the proceedings are remitted back to the Assistant Collector for disposing of the refund applications on merits. The Assistant Collector shall calculate the amount of refund which the petitioners are entitled to and award the said amount within a period of three months from to-day. The competent authority, to whom the proceedings are remitted by an order passed by the Central Government on September 15, 1977, shall dispose of the proceedings within a period of three months from to-day in accordance with this judgment and grant the amount of refund. The short-levy notice received by the petitioners and details of which are set out in Exh. "I" to the petition, shall be disposed of in accordance with this judgment.

In the circumstances of the case, there will be no order as to costs.